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WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 109

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant.

v.

THE UNITED STATES.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION (b) MADE BY NORFOLK-HAMPTON ROADS COMPANY.

WM. LEIGH WILLIAMS,

E. R. F. WELLS,

Attorneys for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 552.

GUARANTY TITLE AND TRUST CORPORATION, Receiver of VUE DE L'EAU COMPANY, a corporation,

Intervenor, Appellant.

v.

THE UNITED STATES.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION (b) MADE BY NORFOLK-HAMPTON ROADS COMPANY.

The Norfolk-Hampton Roads Company has submitted two motions in writing as follows:

"(a) A motion that Norfolk-Hampton Roads Company be admitted as a party appellee to the above entitled cause, and entered as such upon the docket and records of said Court, with leave to defend therein and file a brief and participate in the argument of said cause in all respects as if said Company had originally been named as one of the appellees in said cause; and

(b) A motion that appellant be required, within such time as the said Court may prescribe, to give bond with good security in a penalty to be fixed by said Court, conditioned that the appellant shall prosecute its appeal to effect, and if it shall fail to make its plea good, that it shall answer all damages and costs; or failing to give such bond as required, that said appeal be dismissed; the order requiring such bond so to provide."

The appellant makes no objection to motion (a); the appeal was applied for and allowed in accordance with the rules and practice of the United States Court of Claims, and it was assumed that all of the parties in that Court thereby became parties to the appeal.

The appellant emphatically resists motion (b), which is to require it to give bond with security to prosecute its appeal to effect, and if it shall fail to make good its plea, to pay the Norfolk-Hampton Roads Company all damages and costs. In other words, the Norfolk-Hampton Roads Company asks this Court to require the appellant to give a supersedeas bond.

ARGUMENT.

(1) In the first place the allowance of an appeal by the United States Court of Claims does not have the effect of a supersedeas. If it be true, as stated on page 9 of the brief of counsel for Norfolk-Hampton Roads Company, that the United States has not paid to it the entire amount of the judgment rendered in its favor by the Court of Claims, it is not because a

supersedeas or other similar writ was granted at the instance of the appellant, but it is because the United States of its own volition refuses to pay it, and the Norfolk-Hampton Roads Company cannot enforce payment.

The appellant has never prayed for a supersedeas or any similar writ prohibiting the United States Government from paying the amount of the judgment rendered in favor of Norfolk-Hampton Roads Company. So far as we are advised there is no such writ available to the appellant. If the United States desires to pay forthwith the entire amount of the judgment rendered by the Court of Claims in favor of Norfolk-Hampton Roads Company, it has a perfect right to do so, but if the judgment of the Court of Claims be reversed, it may have to pay a portion thereof a second time to the appellant. The appellant is content to rely on the financial responsibility of the United States without the aid of a supersedeas. It is therefore not correct to say that the appeal "operated as a supersedeas."

Even in controversies between private parties where the one appealing has the right to a supersedeas pending the appeal, he does not have to exercise this right if he is willing to rely on the financial responsibility of the other party. It is a matter of common practice for appeals to be taken without a supersedeas being asked for. The most that can be said is that the appellant takes some risk, but as to this no one else may complain.

(2) In the second place there is no statute or rule of either Court with which we are familiar, which requires a party appealing from a judgment of the

Court of Claims to give a bond. On page 10 of the brief of counsel for Norfolk-Hampton Roads Company the following statement is made: "As against the United States, the intervenor has the right to appeal without giving bond, but not as against a private party whose judgment is *ipso facto* suspended by the appeal." No authority is cited in support of this statement and we have been able to find none. We must also take issue with counsel in his statement that the judgment is "*ipso facto* suspended by the appeal." The judgment is not suspended at all by the appeal, but the United States simply refuses to pay.

Certainly in the absence of a statute, this Court cannot arbitrarily require the appellant to execute a supersedeas bond for the benefit of the Norfolk-Hampton Roads Company. When this appeal was taken the provisions of the applicable statutes and rules of Court were complied with, and it would seem clear that this Honorable Court has not the power to make additional requirements.

On page 11 of his brief, counsel for Norfolk-Hampton Roads Company says that such a requirement would seem to be at least within the spirit of R. S. Sec. 1000, Comp. Stat. Sec. 1660. This Section requires a justice or a judge signing a citation on any writ of error, with certain exceptions, to take good and sufficient security for damages and costs "where a writ is a supersedeas and stays execution." This clearly has no application to the case at bar.

It must be borne in mind that the claim of the appellant is against the United States and not against Norfolk-Hampton Roads Company. The Court of

Claims dismissed its claim against the United States and it is from that judgment that this appeal is being prosecuted. If, during the pendency of the appeal, the United States sees fit to pay the Norfolk-Hampton Roads Company the amount of the claim there is no process which prevents its doing so, but it runs the risk of having to pay it the second time if the judgment of this Court be in favor of the appellant.

Nor is any bond required of the appellant for Court costs. In accordance with the rules and practice of this Court, deposits for costs have been required and made in advance.

The record shows that the appellant executed a bond in the State Court conditioned for the faithful discharge of its duties as receiver (R. 9, 10).

It is respectfully submitted that motion (b) should be dismissed.

WM. LEIGH WILLIAMS,

E. R. F. WELLS,

Attorneys for Appellant.

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v.

THE UNITED STATES.

BRIEF ON BEHALF OF NORFOLK-HAMPTON ROADS COMPANY, APPELLEE.

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THE UNITED STATES.

BRIEF ON BEHALF OF NORFOLK-HAMPTON ROADS COMPANY, APPELLEE.

STATEMENT.

History of the Litigation.

This is an appeal from the judgment of the United States Court of Claims entered on the 26th day of June, 1922, in the suit of Norfolk-Hampton Roads

Company, Plaintiff, and Guaranty Title and Trust Corporation, Receiver of Vue de L'Eau Company, Intervenor, *v.* The United States.

The suit was brought by Norfolk-Hampton Roads Company to recover the value of certain land known as the "Pine Grove Block," which was taken from the plaintiff company for the United States by proclamation of the President, June 28, 1917, pursuant to an Act of Congress authorizing the establishment of a Naval Operating Base, Hampton Roads, Virginia. (Act June 15, 1917, 40 Stat. 207.)

In its petition the plaintiff, Norfolk-Hampton Roads Company, alleged that at the time of the taking it owned and occupied the entire block; that title and possession thereof were taken from the plaintiff by the United States; and that no part of the value had been paid; and prayed judgment for such value.

The suit was instituted on December 7, 1920.

On April 12, 1921, the Circuit Court of the City of Norfolk, Virginia, on the *ex parte* application of one Grice, who claimed to be a stockholder, appointed Guaranty Title and Trust Corporation receiver of Vue de L'Eau Company, and authorized it to assert a claim against the United States for the value of a part of said land.

Thereafter, on May 31, 1921, Guaranty Title and Trust Corporation, as such receiver, filed its petition of intervention in the above-mentioned suit of Norfolk-Hampton Roads Company *v.* The United States, claiming that at the time of the taking of said land Vue de L'Eau Company had title to a portion thereof and asserting a claim against the United States for the value of such portion.

Evidence was taken, and on May 22, 1922, the case was argued before the Court of Claims and submitted.

On June 26, 1922, the United States Court of Claims filed its findings of fact, wherein among other things, the said Court found the value of that portion of said land, which was not in dispute, to be the sum of $35,500.00; and the value of that portion thereof claimed by both plaintiff, Norfolk-Hampton Roads Company, and the said Intervenor, the sum of $33,000.00. As a conclusion of law on its findings of fact said Court held that the plaintiff, Norfolk-Hampton Roads Company, was entitled to recover the sum of $68,500.00, the value of the whole of said tract as found therein, both the portion in dispute and the portion not in dispute; and that the Intervenor, Guaranty Title and Trust Corporation, Receiver, was not entitled to recover. (Record, p. 15.)

Thereupon, in conformity with said conclusion of law, the said Court entered judgment in favor of the plaintiff, Norfolk-Hampton Roads Company, against the United States for the said sum of $68,500.00, and by the same order, dismissed the petition of the Intervenor. (Record, p. 15.)

From this judgment the Intervenor, Guaranty Title and Trust Corporation, appealed. The United States did not appeal. Norfolk-Hampton Roads Company, the plaintiff below, was originally not made a party to this appeal; but on its motion, was admitted as a party appellee by this Court by order of June 4, 1923.

After the appeal was taken, viz., in November, 1922, the United States, with the consent of the Inter-

venor-Appellant, expressed by formal stipulation, paid to Norfolk-Hampton Roads Company on account of said judgment, the sum of $35,500.00, representing the value of that portion of said land which was not in dispute.

The balance of the judgment, $33,000.00, is the amount in controversy on this appeal.

For convenience, the Norfolk-Hampton Roads Company, plaintiff below, will be referred to herein as Plaintiff-Appellee. References to the Findings of Fact will be abbreviated to the word Finding, with the appropriate paragraph number, and page of the record added, thus: "Finding II, p. 11."

Facts of the Case.

The land in dispute in this case was taken by the Government from Norfolk-Hampton Roads Company.

It was a part of the parcel of land designated as Pine Grove, all of which was in possession of the Norfolk-Hampton Roads Company, on and prior to June 28, 1917.

Possession and control of the entire block or parcel were surrendered by that company to the United States on or before August 1, 1917, pursuant to proclamation and demand of the President under date of June 28, 1917. Finding II, pp. 11 and 12.

The Pine Grove Block containing 9.22 acres was a part of a tract of about 294 acres, which for several years immediately prior to 1874 had belonged to the Vue de L'Eau Company, a corporation chartered under the laws of Virginia. Finding III, p. 12.

About the year 1873 the Vue de L'Eau Company caused a small area of its land to be subdivided into lots and streets, designating the same as the "Prize Lot Reserve." Seven of these lots had been conveyed by the Vue de L'Eau Company prior to the assignment hereinafter mentioned. These seven lots are in no wise involved in this litigation. The portion of the "Prize Lot Reserve" that is involved herein contained 4.55 acres.

In January, 1874, the Vue de L'Eau Company executed a deed of assignment for the benefit of its creditors, whereby it conveyed to trustees under the assignment all of its lands and other property except the land embraced in the "Prize Lot Reserve." Finding IV, pp. 12 and 13.

Immediately after the general assignment for the benefit of its creditors, Vue de L'Eau Company became dormant. No organization in the way of a board of directors or officers was kept up, though no formal dissolution was had. Legally and technically it continued to exist, but in point of fact, it was in a condition of suspended animation, wholly dormant and inactive. Finding V, p. 13.

From the time of the assignment for the benefit of its creditors in 1874, until April, 1921, four years after this land was taken by the Government, Vue de L'Eau Company continued dormant. During that period of forty-seven years it did nothing whatever with reference to the land and lots comprising the "Prize Lot Reserve." It abandoned this land immediately after the general assignment for the benefit of its creditors in 1874, leaving it then in a condition of neglect. Finding VI, p. 13.

In the year 1899, Norfolk-Hampton Roads Company acquired by purchase a large acreage of land contiguous and adjacent to the so-cal'ed "Prize Lot Reserve," its holdings completely inclosing the latter on its land side. Finding III, p. 12 and Finding VII, p. 13.

The "Prize Lot Reserve" was at this time in a condition of neglect. It had been abandoned by the owner of the record title twenty-five years before. It lay there a small parcel of "No Man's Land," and so situated with reference to the property of Norfolk-Hampton Roads Company as to interfere with the development of the latter. In that situation it seemed desirable to acquire title to the said "Prize Lot Reserve" by adverse possession. Indeed, as is apparent from the Findings of Fact, that was the only way title could be acquired, the owner of the record title having then been dormant for a quarter of a century, and there being no one with whom negotiations for its purchase could be had.

Accordingly, Norfolk-Hampton Roads Company deliberately set about the acquisition of title to said land by adverse possession. For that purpose it took immediate possession of said land when it acquired the contiguous lands in 1899; and in the most open and notorious way, asserted claim to it by acts of record and otherwise.

The Findings of Fact bearing upon the character and duration of that possession will be dealt with at the appropriate place in the argument.

Here we content ourselves with the statement that from 1899 until title and possession were taken from

it by the Government in 1917, Norfolk-Hampton Roads Company was in the actual, open, notorious, uninterrupted and exclusive possession of the land of the "Prize Lot Reserve," claiming and treating it in all respects as its own; and that its possession was hostile to the owner of the record title.

ARGUMENT.

The appellant in this case complains of a judgment rendered in favor of Norfolk-Hampton Roads Company against the United States. The Government was satisfied with the judgment and took no appeal. As shown by the Findings of Fact all of the dealings of the Government with respect to this property were had with Norfolk-Hampton Roads Company. From that company the property was taken. It is a fair conclusion that the Government took no appeal because it had taken property of value from the Plaintiff-Appellee—its possession and use, if nothing more—and was willing that just compensation be paid therefor. For even if the contention of appellant that the actual possession of Norfolk-Hampton Roads Company did not begin until the year 1907 were true—and it is not true; yet in disturbing a possession of even that duration, in depriving Norfolk-Hampton Roads Company of the possession and use of the property and the improvements made in the course of its possession, the Government took from that company property of value for which it was entitled to compensation. A judgment in its favor therefore could not be wholly wrong, even if the naked legal title had been

in Vue de L'Eau Company at the time of the taking.

But the Court of Claims found that Norfolk-Hampton Roads Company had acquired title by adverse possession. In this finding and in the judgment based thereon, we submit, there was no error. In this connection we ask the indulgence of the Court in a somewhat extended review of the law relating to the acquisition of title by adverse possession.

THE LAW RELATING TO TITLE BY ADVERSE POSSESSION.

Statutory Period Fifteen Years.

It is provided by statute in Virginia, that

> "No person shall make an entry on or bring an action to recover, any land lying east of the Alleghany mountains, but within fifteen years, or any land lying west of the Alleghany mountains, but within ten years, next after the time at which the right to make such entry or bring such action shall have first accrued to himself or to some person through whom he claims."

Code of Virginia of 1887, Sec. 2915; Code of 1904, Sec. 2915, and Code of 1919, Sec. 5805.

Adverse possession of land for the period of the Statute of Limitations not only bars the owner's right of entry or action; but transfers the legal title to the occupant. The statute is a source of title as well as a defense.

Minor on Real Property, Sec. 1021, p. 1098.
Middleton v. *Johns*, 4 Gratt. 129.

Norfolk City v. *Cooke*, 27 Gratt. 430.
Thomas v. *Jones*, 28 Gratt. 383.
Dickenson v. *Colgrove*, 100 U. S. 578.
Virginia Midland Co. v. *Barbour*, 97 Va. 118.

Such possession must be actual, open and notorious, exclusive, continuous and uninterrupted, and hostile.

Taylor v. *Burnside*, 1 Gratt. 166.
Sulphur Mines Co. v. *Thompson*, 93 Va. 293.
Minor on Real Property, Vol. II, Sec. 1025, p. 1103.

Color of Title Not Necessary.

It is not necessary that such possession be under color of title. Color of title is important only where constructive possession is relied upon. Possession under a mere claim is sufficient. The difference is, that where one claims under a deed or other instrument constituting color of title, his possession of a *part* of the land within the boundaries therein described is extended to the whole. *Stull* v. *Rich Patch Iron Company*, 92 Va. 253. But if he is in possession under a claim only, then his title by adverse possession is limited to the land in his actual possession.

Sulphur Mines Co. v. *Thompson*, 93 Va. 293.

The latter case involved a controversy over the title to twenty-five acres of land, the defendant claiming the same by adverse possession. The deed whereby the defendant acquired title to the adjoining lands known as the Furnace property did not cover the twenty-five acre tract in controversy, nor was it covered by the deeds to those under whom the defendant claimed. (See p. 318 of the official report). It appeared that a prior owner of the Furnace property had had a map of that property made which did include the land in question. This map was shown to defendant when it purchased the Furnace property; but was not attached to the deed, nor was it ever recorded. The defendant, therefore, had no color of title to the twenty-five acre tract unless it was supplied by this unrecorded map. It was held that the map was not color of title; but that it was proper evidence to show the extent and character of the defendant's claim. Judge Buchanan, speaking for the Court, said:

> "The survey and map were proper evidence to show the character of defendant's claim of right or title. If it and those under whom it claims were continuously in adverse possession of the whole, or any part of the land in controversy for the statutory period prior to the institution of this action, then its title to the land to the extent that it and those under whom it claims had occupied, cultivated, enclosed or otherwise excluded the owner from it became perfect, but if such occupancy did not extend to the whole of the land in controversy its possession would be limited to the land so held and could not be extended to the residue

of the land in controversy, as would have been the case if the possession had been taken and held under color of title instead of claim of right or title only."

Nor is it Necessary That Such Claim be Valid.

The claim that will support adverse possession so as to confer title upon the occupant need not be founded upon any writing of any kind whatsoever, and it is wholly immaterial whether such claim was originally good or bad, valid or void.

> "As has often been asserted, it is not requisite that the claim under which a possession of land is commenced should be valid. It is sufficient if the party 'clearly, unequivocally and notoriously' claimed absolute title to the exclusion of all right, title or interest in the true owner. It is wholly immaterial whether the claim upon which an adverse possession is founded is made upon a valid or void instrument; nor indeed is it necessary, except in cases of constructive occupancy, that the claim should be founded upon any written instrument whatever. But the possession must be under a claim of the entire title, and the same must be in open hostility to the true title."

Tyler on Ejectment and Adverse Enjoyment, p. 887.

In *Virginia Midland R. Co.* v. *Barbour*, 97 Va. 118, the property in controversy was purchased in 1868 by one John T. Hicks. Hicks becoming bankrupt, the

property was sold by his assignee in bankruptcy in 1878, and regularly conveyed to the purchaser, Virginia Midland, etc., Railroad Company. Shortly thereafter one B. F. Nalle, as agent for the railroad company, made demand on Hicks for possession. Hicks, with shot gun in hand, ordered Nalle and two workmen he had with him off the place, telling them the railroad company had no title to it and that it belonged to him, and threatening to shoot Nalle unless he got off. Taking counsel of his prudence, Nalle withdrew, leaving Hicks in possession. Hicks continued to hold the property until his death in 1887, and thereafter his widow and son continued to occupy it down to the time the suit was brought in 1898. After the demand of Nalle in 1878 the railroad company made no further attempt to get possession of the property. Upon that state of facts it was insisted that the possession of Hicks and those claiming under him had never been adverse to the title of the railroad company. The contention was based upon two grounds.

(1) That after the sale and conveyance of the property in the bankruptcy proceedings, Hicks was a mere tenant by sufferance, holding in subordination to the title of the railroad company; and

(2) That when he claimed title in himself Hicks was a mere squatter without a scintilla of title.

In disposing of the second ground Judge Buchanan, speaking for the whole court, said:

> "It may be true, as contended, that Hicks, when he denied the title of the appellant, and asserted ownership in himself, did not have a scintilla of title to the land. The question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continuous possession under it for the statutory period. Neither is it necessary that such hostile claim should be under color of title; that is under deed or other writing. But where it is a mere claim, that is, a mere assertion of a right without any paper title, the adverse holding is limited to the actual enclosure of the claimant, citing *inter alia*. *Kinchloe* v. *Tracewell*, 11 Gratt. 605; and *Sulphur Mines Co.* v. *Thompson*, 93 Va. 319."

See also *Probst* v. *Board of Missions*, 129 U. S. 182.

While Judge Buchanan, in the paragraph above quoted, uses the expression actual enclosure, it is apparent from the cases he cites that what he meant was actual possession. It happened that the lot of land with which he was then dealing was enclosed by a fence, and that was a convenient method of showing the extent of Hicks' claim and possession. The same learned Judge, as we shall presently see, in *Sulphur Mines Co.* v. *Thompson*, *supra*, approved an instruction to the effect that enclosure by fence was not necessary to the acquisition of title by adverse possession, and that, too, in a case where the occupant was without color of title, and held under a naked claim. And *Sulphur Mines Company* v. *Thompson* is one of the cases he cites with approval in this case. In *Kinchloe* v. *Tracewell*, the other case cited above, this point was not involved.

What is meant by "claim of right" and the character of claim that will support title by adverse possession will be more fully discussed later in this brief when we come to deal with appellant's contention that appellee's possession was not with claim of right.

In the next succeeding paragraph we shall show that Virginia, in common with the other States of the Union, recognizes the rule that—

Enclosure Is Unnecessary.

It is universally held in America that in order to the acquisition of title by adverse possession, it is not necessary that the land be actually enclosed.

> "Except in one State, Tennessee, it is not necessary to constitute actual possession that there should be an enclosure of the premises unless this is required by statute."
>
> *Corpus Juris*, Vol. II, p. 60.

Even in Tennessee, the one exception noted in the above quotation from *Corpus Juris*, the cases on which that exception rested have been overruled, and it is now held that enclosure is not necessary to establish title by adverse possession. *Bensdorf* v. *Uihlein* (Tenn.) 177, S. W. 481.

The precise question, viz.: whether enclosure is necessary where the possession rests upon a mere claim without color of title was before the Supreme Court of Appeals of Virginia in the case of *Sulphur Mines Company* v. *Thompson, supra.*

In that case, as hereinabove noted, the defendant claimed title by adverse possession to the twenty-five acres of land in controversy. It had no color of title and its possession rested upon a mere naked claim. The record on file in the Clerk's Office of the Supreme Court of Appeals discloses that only about five acres of the land had ever been fenced. The balance of the tract was unenclosed. The defendant's possession rested on ordinary acts of ownership, such as cutting timber, and taking of minerals.

The trial Court had granted among other instructions, the following, designated as Defendant's Instruction No. 3:

> "The court further instructs the jury that the exercise by the defendant, or those under whom it claims, of open, notorious and habitual acts of ownership over the land in controversy, is sufficient evidence of possession, and it is not necessary to such possession that the land should be enclosed, or built upon, or actually cultivated or cleared."

This instruction was approved on appeal. The judgment of the Court below was reversed on other grounds. In remanding the case for a new trial, the Court reviewed the action of the trial Court in granting and refusing instructions. It was said that Defendant's Instructions 9 and 10, which had no bearing on this point, were properly refused; but that the instructions granted by the Court below correctly stated the law. Thus at p. 321, Judge Buchanan, speaking for a unanimous court, said:

> "Without discussing in detail the action of the court in giving and refusing the other instructions given and refused, it is sufficeint to say that under the facts of this case, the rulings of the court upon these instructions were correct."

The question has, therefore, been settled in Virginia that enclosure is not necessary to adverse possession, even where the occupant is without color of title, and holds under a naked claim.

In so holding Virginia but adheres to the universal rule on the subject. Perhaps no better statement of the rule can be found, than that of Mr. Justice Field in *Zeilin* v. *Rogers*, 21 Fed. 103.

> "Neither residence upon land nor its inclosure by artificial means is absolutely necessary to create an adverse possession, even where the premises are not claimed under color of title. Either of these circumstances is strong evidence to establish such possession; but it may be shown in other ways. A subjection of the land by the claimants to such uses as it is ordinarily susceptible of, to the exclusion of others is an adverse possession; and that subjection may appear by its cultivation or occupation for the ordinary purposes of husbandry or pasturage. The extent of the land to which an adverse possession is claimed must, of course, be clearly indicated, so that others may see and respect it; but it need not be shown by an artificial inclosure. — — — The subjection of the land to the uses of the claimant, to the exclusion of others, and the identification with reasonable certainty, according to the circumstances of the case, in some

> visible or appreciable way, of its extent, are the material facts necessary to establish the adverse character of the possession. In many decisions an inclosure is spoken of as essential, because the limits of the land in controversy could only be marked conveniently in that way. But the essential fact is the indication, given by the inclosure, of the limit to which the possession claimed extends. None of the authorities deny the equal efficacy with an artificial inclosure of other defined boundaries or means of indicating the limits of a tract to which the possession of an occupant extends."

See also *Lyons* v. *Fairmont Real Estate Co.* (W. Va.), 77 S. E. 525; and *Wade* v. *McDougle* (W. Va.), 52 S. E. 1026.

Meaning of Actual Possession.

By actual possession as used in this connection is meant only that the adverse claimant shall have openly exercised habitual acts of ownership over the property, and made such uses of it as it is ordinarily susceptible of. Residence upon it and enclosure by physical means are not required.

> "A subjection of land by claimant to such uses as it is ordinarily susceptible of, to the exclusion of others, is an adverse possession."

Mr. Justice Field in *Zeilin* v. *Rogers, supra.*

This is the rule in Virginia.

The learned Counsel for the appellant at page 15

of his brief quotes from the opinion of Judge Baldwin in *Taylor* v. *Burnside*, 1 Gratt. 165. But unfortunately the quotation gives only a part of Judge Baldwin's statement of what may constitute actual possession.

The full quotation follows; and we have taken the liberty of printing in italics the portion omitted by Counsel for the appellant.

> "An adversary possession must also be actual in reference to the means by which it was acquired. In that sense, I understand an actual possession to be the occupation, use or enjoyment of the subject matter in controversy by residence, cultivation, improvement or other open, notorious and habitual acts of ownership. These modes of occupation, use or enjoyment, residence, cultivation and improvement, while they continue are usually the most obvious and most decisive. *But there may be other open, notorious and habitual acts of ownership of quite equivalent import and effect. Take, for example, the case of a town resident who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously and habitually cuts and hauls from it his necessary supplies of fuel; or, in like manner, makes it a source of revenue by sales of fire-wood or timber; or the case of an unenclosed or unimproved lot in or near a city devoted by the professed owner to his use or profit as a coal or lumber yard, quarry or landing place. There cannot be stronger evidence of actual possession than these and other like cases which might be stated, but they can only serve for the purpose of illustration. When we leave the unquestionable tests of residence, cultivation and improvement, every case must depend in a great measure upon its own circumstances, and*

requires a recurrence to the general principle above stated of open, notorious and habitual acts of ownership."

And as we have seen above, the Supreme Court of Appeals of Virginia, in *Sulphur Mines Co.* v. *Thompson*, approved an instruction which told the jury that:

> "The exercise of open, notorious and habitual acts of ownership over the land in controversy is sufficient evidence of possession, and it is not necessary to such possession that the land should be enclosed, built upon or actually cultivated or cleared."

In that case the adverse claimant had at the beginning of its occupancy neither title nor color of title. It merely asserted a claim to the land without paper title of any kind. This assertion of a claim constituted its "claim of right."

Payment of Taxes.

The payment of taxes is not an element of adverse possession unless made so by express statutory requrement.

> *Cyc. Vol. I, p. 1106.*
> *Corpus Juris, Vol. II, p. 203.*

There is no such statute in Virginia. The payment of taxes is, therefore, not necessary to the acquisition of title by adverse possession.

The question of taxes is not involved in this

litigation, there being no unpaid taxes assessed against the property.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

The findings of the Court below so far as they relate to the character and duration of plaintiff-appellee's possession of the land in dispute, and to appellant's conduct with respect to said land will be found in the Appendix at the end of this brief.

Appellee's Possession Met all Requirements of the Law.

Counsel for appellant appears to concede that appellee's possession met all legal requirements to confer title except two. At page 15 of his brief, he says: "two of the essentials of adverse possession were not present." These were, as contended by counsel, (1) that prior to 1907, appellee was never in actual possession of the land; and (2) at no time did it have a claim of right or title thereto.

It seems unnecessary therefore to discuss at length any feature of appellee's possession other than the two whose sufficiency is thus challenged. Hence we shall at this point content ourselves with pointing out briefly that that possession met every requirement of the law, reserving for fuller discussion later herein, the two objections urged against it by counsel for the appellant.

That possession was:

(a) *Actual.* (For discussion of this point see page 26, *post.*)

(b) *Open and Notorious.*

Publicity matter issued by the Norfolk-Hampton Roads Company in 1899 advertised to the world that this land belonged to that company, and the company recorded plats of its property on which this land was included and indicated as a part of its holdings. In 1901, the company laid out its lands, including the "Prize Lot Reserve," into streets and lots for a suburban addition to the City of Norfolk; and a plat of that subdivision known as "Subdivision No. 1, Norfolk on the Roads" was recorded in the County Clerk's office on June 14, 1901. That plat, which included the "Prize Lot" land, bore the legend "Property of Norfolk-Hampton Roads Company." In connection with the laying out of this subdivision streets were opened and graded by the company, through the land of the Reserve. From 1899 until 1917, when it was taken by the Government, this land was held out and treated by the company as being its own property. So notorious was this fact, so generally was its possession and ownership recognized in the community, that the Jamestown Exposition Company, a *quasi* public corporation, in 1907 occupied this land as lessee of Norfolk-Hampton Roads Company under formal lease from that company. Finding VII.

(c) *Continuous and Uninterrupted for More than the Statutory Period and Exclusive.*

There is no claim that any person other than Norfolk-Hampton Roads Company, or a lessee of that company, was ever in possession of this land at any time between 1899 and its taking by the Government in 1917. The Vue de L'Eau Company was still wrapped in the slumber into which it passed in 1874, a slumber from which it was never aroused until 1921, four years after title and possession were taken by the United States. The language of Finding VII dealing with the time during which plaintiff-appellee exercised absolute dominion over this property, is—"From thenceforward (1899) to the time of its taking by the Government in June 1917." Clearer language could not have been employed. It shows that there was never a break in appellee's possession of this land and that that possession was exclusive.

If it could have been shown that any person other than Norfolk-Hampton Roads Company or its lessee was ever in possession of the property during that period we may be sure it would have been done.

(d) *Hostile.*

Plaintiff-appellee's possession was never held in subordination to the title of Vue de L'Eau Company, or any other person; but in open defiance to the owner of the record title, and to the exclusion of such owner and all other persons. It was therefore *hostile* within the meaning of the law on this subject.

(e) *Under a Claim of Right.* (For discussion of this point see page 32, *post.*)

DISCUSSION OF OBJECTIONS URGED BY APPELLANT AGAINST APPELLEE'S TITLE

As above noted appellant denies the sufficiency of appellee's possession to confer title in two particulars, claiming that the actual possession dated only from 1907, and that the possession was without claim of right.

In addition to this, counsel suggests, that the land in question was not susceptible of adverse possession, because, as he intimates, in a complete state of nature.

We shall reply to this suggestion before taking up the discussion of the two objections above noted.

Land Not in a State of Nature.

The rule by which appellant seeks to obviate the effect of claimant's possession is stated on page 15 of its brief:

> "Wild and uncultivated lands cannot be made the subject of adversary possession *while they remain completely in a state of nature.* A change in their condition, *to some extent*, is therefore essential; and the acts by which it is effected are often the strongest evidences of actual possession."

It will be noted that such lands are excepted only when *completely* in a state of nature; and that even wild ands require a change only *to some extent.* The exact

extent is not defined, and it is submitted that any change whatever will remove them from such classification.

The very term "complete state of nature" makes untenable the theory that property once removed from that category could revert thereto—certainly within the space of a few years.

Nor is the rule ever applied in a case of actual possession. The fact that the land is completely in a state of nature is usually taken as evidence that there has been no one in possession. But if actual possession can be shown even in the case of wild lands, the statute will run. This is clearly shown in the case of *Chilton* v. *White* (W. Va.), 78 S. E. 1048, cited by Counsel for the appellant.

> "There can be no adverse possession of wild lands as against the superior title *unless* such possession is *actual, exclusive, visible and notorious.*"

It is idle for appellant to claim that the "Prize Lot Area" or any part of the "Pine Grove Block" was in a state of nature. The tract was part of a valuable farm when conveyed to the Vue de L'Eau Company in 1871; the company in 1873 laid off this identical tract into streets and town lots for suburban homes.

The statement in Finding VI that after the Vue de L'Eau Company made its general assignment in 1874, it did nothing further with reference to this land, and that the same was allowed to further develop forest growth thereon has reference to the time when that company ceased to function in 1874.

But assuming for the sake of argument that this tract was in a complete state of nature in 1899, Norfolk-Hampton Roads Company immediately effected extensive changes in the condition of the property—not merely changes "to some extent." It took possession of it, cut and marketed timber from it, and built bulkheads along the water front to protect it from the action of the water. It laid it out in streets and building lots in 1901 as a suburban addition to the City of Norfolk.

With these and other facts in the record, even assuming the land to have been in a "complete state of nature" in 1899, it is certain that claimant did much more than effect a change in its condition "to some extent." It wrought a complete transformation therein.

Appellant cites *City of Richmond* v. *Jones*, 111 Va. 214, 217. This was a case of an attempt to claim title by adverse possession to an island in the James River. The island was in a complete state of nature—no changes having been wrought in its condition by the hand of man—and the adverse claimant had never been in *actual possession* thereof; nor had he occupied, improved, or cultivated it, or exercised any acts of ownership over it. The case is not in point.

Whealton v. *Doughty*, 112 Va. 649, applied to marsh lands on the sea shore; adverse claimant was not in actual possession of the property, and the only acts of ownership consisted of occasional roaming of cattle over the lands and the cutting of grass. Again not in point.

Providence, &c., Club v. *Miller Manufacturing Co.*, 117 Va. 129, is also entirely inapplicable here.

Counsel dwells somewhat at length on the case of *Craig-Giles Iron Co.* v. *Wickline*, 126 Va. 223, and evi-

dently regards the facts therein as being in some remote way similar to those of the case at bar. That they are in no way similar is shown by the statement of Judge Kelly, found in the body of the opinion (129 Va., at page 231):

> "The only affirmative acts of ownership exercised on the land, until defendants entered thereon in 1914 or 1915, were the cutting of timber therefrom *at remote intervals.*" (Italics ours.)

There was no actual possession in that case until defendant entered on the land in 1914 or 1915. In the instant case, as is shown by the Record, plaintiff-appellee was in actual possession from 1899 to June 28, 1917. The case has practically nothing in common with the case at bar.

This is also true of *Chilton* v. *White* (W. Va.), 78 S. E. In none of the cases relied on by the appellant was actual possession shown.

This brings us to the two principal contentions made on behalf of appellant, viz.: (1) that appellee's possession did not begin until the year 1907, and (2) that its possession was not under a claim of right. These will be dealt with in the order stated.

Character and Duration of Appellee's Possession.

We have already shown that this possession was open and notorious, continuous, uninterrupted, exclusive and hostile. The attention of the Court is here invited to the fact that it was *actual* and that it began in 1899 and continued until the property was taken by the Government in 1917.

The Court of Claims found that upon purchasing in 1899 the extensive tract of land contiguous to the "Prize Lot Reserve" and completely enclosing the same on its land sides, Norfolk-Hampton Roads Company deliberately set about acquiring the title to said Reserve "by adverse possession." Naturally the first step in such a program would be the *possession;* and that the Court finds the plaintiff-appellee took and held as follows:

> "The plaintiff company, upon its purchase, in 1899, of its large holdings of land inclosing said "Prize Lot Reserve" on its land sides, took possession of said holdings and from thenceforward to the time of its taking by the Government *in* June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which, stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the County Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and tides. Said company also leased an area of its lands to the Jamestown Ex-

> position Company, in ~~1917~~ 1907, including therewith said "Prize Lot Reserve" land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land of said Reserve was held out and treated by plaintiff company as being the property of said company."—Finding VII.

This language is, we submit, susceptible of no other meaning than that the plaintiff-appellee was in the *actual* possession of the land in question from 1899 until it was taken by the Government in 1917.

It held this land as it held its other contiguous property which completely hemmed it in on its land sides, and treated it the same. All was in its actual possession. Following the statement that from 1899 until the property was taken by the Government in 1917, the plaintiff company treated this land as though it belonged to itself, is an enumeration of some of the acts of ownership and dominion exercised over the land of the Reserve in the course of its possession. They are not to be treated as Counsel undertakes to treat them, as a specification of particular and isolated acts, but as illustrations of the character of the dominion exercised over the property by plaintiff-appellee throughout the period covered by the expression "From thenceforward (1899) to the time of its taking by the Government in June, 1917."

Counsel for appellant at pages 8 and 9 of his brief undertakes to dissect and dismember Finding VII; to detach each characteristic or illustrative act from its

context, and treat each as though it were an isolated fact—merely an occasional trespass.

It is, of course, good military strategy to break up the enemy into small detachments, and beat him in detail when possible; but this method is not permissible in dialectics—certainly not in dealing with a body of facts on which a Court of Justice has based its judgment.

On the combined effect of this statement of facts grouped as they are and taken as a whole, the Court of Claims based its judgment.

In the same manner the finding must be treated on appeal.

In *United States* v. *Pugh*, 99 U. S. 265, the Court of Claims found, not the ultimate fact on which alone its judgment could be sustained; but the circumstantial facts from which the ultimate fact could fairly be inferred. In answering the objection that this did not comply with the rule requiring the facts and not the evidence to be certified, Mr. Chief Justice Waite said:

> "This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be *grouped*, and their legal effect *as a whole*, determined." (Italics ours.)

The learned Chief Justice also said (p. 270) that whether the facts found establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law.

> Cited in *McClure* v. *United States*, 116 U. S. 145.
> See, also, *United States* v. *Andrews*, 179 U. S. 96.

Even if it were true, as contended by appellant's Counsel, that the findings of fact in the instant case stop short of stating *expressly* the ultimate fact of actual possession; yet upon the authority of *United States* v. *Pugh*, *supra*, the findings are sufficient to support the judgment. They are, to say the least, the legal equivalent of an express finding of possession. They show that from 1899 until the property was taken in 1917, plaintiff-appellee exercised a dominion and control that are possible only to one in possession.

Even if the facts found in this case were to be treated only as circumstantial facts, yet it is submitted that under the law of Virginia, which allows *possession* to be proved by evidence of just such acts as are here mentioned, they are sufficient to support the judgment.

As noted earlier in this brief, in the case of *Sulphur Mines Company* v. *Thompson*, 93 Va. 293, a case cited on behalf of appellant, the Supreme Court of Appeals approved an instruction in this language:

> "The court further instructs the jury that the exercise by the defendant, or those under whom it claims, of open, notorious and habitual acts of ownership over the land in controversy, is sufficient evidence of possession, and it is not

> necessary to such possession that the land should be enclosed, or built upon, or actually cultivated or cleared."

It is respectfully submitted that if the exercise of open, notorious and habitual acts of ownership, is *sufficient evidence of possession;* and the highest court of Virginia has said that it is, then the fact of possession for more than the statutory period is conclusively shown by the findings in this case.

We may add that if the findings were open to two constructions, one of which would sustain the judgment, and the other render it void, it would be the duty of this Court, under well established principles, to adopt that construction which will uphold the judgment.

United States v. *Andrews*, 179 U. S. 96.

In that case Mr. Justice Peckham, in disposing of the contention that the findings of fact were not sufficient to sustain the judgment, said:

> "While the finding might have been more definite and therefore more satisfactory, yet within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe it as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid."

Plaintiff-Appellee's Possession was Under a Claim of Right.

We have already seen that upon taking possession in 1899, Norfolk-Hampton Roads Company asserted a claim to the land of the "Prize Lot Reserve" in the most public manner possible. It advertised the property as belonging to it; it recorded plats on which this property was indicated as its own; it subdivided it into lots and streets, by its plat known as "Subdivision No. 1, Norfolk-on-the-Roads, Property of Norfolk-Hampton Roads Company," which plat was recorded in the County Clerk's office of Norfolk County on June 14, 1901, and so notorious was its claim of ownership, so generally was its title acknowledged, that Jamestown Exposition Company, in 1907, recognized it as the owner, and obtained from it a lease of the property. Finding VII.

There could be no mistaking the intention with which it held this property. It claimed it as its own. The sufficiency of this claim is challenged by appellant.

At page 27 of his brief, the learned Counsel for the appellant says:

> "We submit that Norfolk-Hampton Roads Company had no claim of right or title to this land; but was a wrong doer from the outset."

This statement evinces a curious misconception of the meaning of the term "claim of right" as used in connection with title by adverse possession. It assumes that a possession originally wrongful could never ripen into title, whereas it has been repeatedly recog-

nized in Virginia that it can and does, and as was said by Mitchel, J., in *Carpenter* v. *Coles*, et al. (Min.), 77 N. W. 424, presently to be cited:

> "The books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim have ripened into title by adverse possession."

Apparently the learned counsel confuses claim of right with color of title. Color of title is always founded upon a deed or other instrument in writing. A claim of right need not be founded upon anything whatsoever. It is purely subjective and consists of the intent with which the dissessor holds.

The practical difference between possession under color of title and possession under a mere claim of right has already been discussed. Here we are concerned only with the meaning of the term claim of right as used in connection with title by adverse possession.

Meaning of Claim of Right.

Claim of right as used in this connection *does not mean a rightful claim.*

It merely means that one claims a right. Claim of right and claim of title are used interchangeably and mean the same thing, viz., that the disseizor claims the property as his own. The claim may be wholly unfounded. Nor is it in any case necessary that the disseizor shall have *believed* his claim good. As we shall presently see, the question of good faith is wholly immaterial in cases of actual possession.

For in Virginia, as elsewhere—unless otherwise provided by statute, as it is in the State of Washington—

> "It is immaterial whether the claim of right be *true* or *false*, *good* or *bad*, in the first instance; but if there is a mere claim, without color of title, the adverse holding of the occupant is always confined to that portion of the land actually occupied."
>
> *Minor on Real Property, Sec. 1035, p. 1112.*

> "If one, either of set purpose or with entire indifference to the rights of his neighbor, builds upon, or otherwise occupies openly and notoriously his neighbor's land, there is no doubt but that this constitutes an adverse possession which will ripen after the lapse of the statutory period into a perfect legal title."
>
> *Minor on Real Property*, § 1036, p. 1113.
> *Brock v. Bear et als*, 100 Va. 562, 565.

In *Brock* v. *Bear*, *supra*, one without any right, title or color of title erected a building on land of a coterminous owner. His possession originated in a naked trespass.

Held, that after the lapse of the statutory period his title by adverse possession was complete.

It was contended by the owner of the record title that the erection of the building on his land occurred through a mistake of the boundary lines and with no intention on the part of the occupant of claiming the land beyond his own line.

In disposing of this contention Judge Harrison of the Supreme Court of Appeals of Virginia said:

> "It is true that adverse possession depends upon the intention with which the possession is taken and held, but while the intention to claim title must be manifest it need not, be expressed. The intention to claim and hold title is often best shown by the act of the parties, and their manner of occupancy. It would be difficult to conceive of a more unequivocal determination to take and hold title to land up to a given line than to erect costly buildings upon the land up to that line and use and occupy the same for years in the face of all persons who could question the right."

To the effect that adverse possession depends upon the intention with which the possession is taken and held; and that while the intention to claim title must be manifest but need not be expressed, see also *Haney* v. *Breeden*, 100 Va. 781.

Not Necessary to the Aquisition of Title that a Disseizor in Actual Possession shall have Believed his Claim or Title Good.

No case in Virginia has held that in order to acquire title by adverse possession of land in his *actual* possession the disseizor must have believed his title good.

The contrary is *expressly* held in the recent case of *Cochran* v. *Hiden*, 130 Va. 123.

Here it is said that not even good faith in taking

and holding possession is essential to the acquisition of title by adverse possession to the land in the actual possession of the disseizor; and that it is only where a purchaser relies upon *constructive* possession arising from the color of title given by his deed, that his claim of title need be *bona fide*.

That this has always been the law of Virginia is apparent from the cases in which a possession originating in wilful trespass has been held to ripen into title.

The case of *Virginia Midland R. Co.* v. *Barbour*, 97 Va. 118, cited by counsel for appellant at page 29 of his brief, well illustrates the point. In that case Hicks, the disseizor, claimed the disputed property against his own grant. He had previously conveyed it to his assignee in bankruptcy under the Bankruptcy Law of 1868. The assignee had sold it to the railroad company. Hicks retained possession and when the railroad company sent its agent to take possession, Hicks met him with shot-gun in hand and drove him from the premises, declaring that the property belonged to him. Hicks could have had no reason in the world for believing his claim valid; yet after the lapse of the statutory period his title was held good.

In the instant case the possession was *actual*, not constructive. The question of the *bona fides* or *mala fides* of the claim of title is therefore wholly immaterial.

In holding that it is the *intention to hold* the property as against the owner of the record title that constitutes the "claim of right," or "claim of title" essential to the acquisition of title by adverse possession; and that as respects land in the actual pos-

session of the disseizor, that claim need not be *bona fide*, in the sense that the disseizor must have had a valid claim to the property, or believed he had, the Virginia Court is in harmony with the text writers and with the decided cases in other jurisdictions.

A few examples will suffice.

Sedgwick & Wait on Trial of Title of Land, Para. 758, states the rule as follows:

> "The adverse intention of the tenant, in the absence of proof of his own admissions to the contrary, or other proof that his possession was only permissive, or in fact without hostile intent, may be generally evidenced by the character of his possession and acts of ownership. If these are sufficiently definite, open, and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts, it is said, the party proclaims to the public an exclusive *ownership over the land.*"

In *Chicago & N. W. Ry. Co. et al.* v. *Groh* (Wis.), 55 N. W. 714, 715, the following instruction was held to correctly state the law:

> "The words 'under claim of title' are not to be taken to mean that it is necessary that Groh should have thought the land belonged to him before he entered, but if he went onto it with the intention to claim it, and keep it as his, without knowing or caring who else claimed to own it, *that would be an entry under claim of title.*"

Chief Justice Lyon, in approving this instruction, said:

> "It is a sufficient claim of title that the entry of the disseizor is hostile to all the world, and he intends to hold the land as his own, and does so hold it for the statutory period of limitation."

The evidence in that case showed that Groh entered upon land without knowing or caring who owned it, and remained there for the statutory period.

In *Rennert* v. *Shirk* (Ind.), 72 N. E. 546, Judge Monk says:

> "To be adverse, possession must be actual, open, and notorious, exclusive, continuous, and under claim of right, *that is, an intention to claim adversely.*" * * * *
>
> "It is not necessary that appellees and those through whom they claim, or any of them ever made oral declaration of such claim of right. It may be inferred from the manner of the occupancy. The same, as well as all the other elements of adverse possession, may be shown by positive acts of ownership inconsistent with the title and possession of the true owner of the real estate in controversy, such as erecting, repairing and occupying the buildings on said real estate, leasing the same and collecting the rents, selling and conveying, and offering to sell and convey said property as improved."

The learned Judge here cites thirty-eight text-writers and decisions in support of this principle.

The rule is thus stated in *La Frombois* v. *Jackson*, 8 Cow. 508, 603, 18 Am. Dec. 463:

> "The actual possession and improvement of the premises as owners are accustomed to possess and improve their estate, without any payment of rent, recognition of title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and unless rebutted by other evidence, *will establish the fact of claim of title.*"

and further:

> "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgement of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is the latter case only that the law adjudges the possession of one to the benefit of another."

Of all of the cases from jurisdictions other than Virginia, none is more instructive than that of *Carpenter* v. *Coles, et al.* (Minn.), 77 N. W. 424. The lower court in that case, as shown by the instructions granted, held precisely the same view that is so ardently contended for by Counsel for the Appellant. The case so aptly illustrates the point under discussion that we take the liberty of quoting therefrom at length.

In the trial below the Court had instructed the jury among other things, that:

> "A person has not any right, arbitrarily and without any claim of right, knowing that he has no right whatever, to go and take with a high hand wrongful possession of land, and avail himself of the statute of limitation."

Also:

> "A person cannot view a piece of land that he has no kind of interest in, no title to, and enter upon it with a view of occupying it fifteen years wrongfully and without any claim of right, with a view of invoking the statute of limitations."

This instruction was held *erroneous*, the judgment reversed, and the cause remanded for a new trial.

Mitchell, J., speaking for the Court, said of the instructions:

> "The meaning of these instructions is that the statute will never run in favor of a disseizor whose adverse possession originated in a naked and wilful trespass; that to set the statute in motion the entry must have been made under some color or claim of title which the disseizor claimed gave him the legal right to enter. This is clearly incorrect, for *the books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim to the land have ripened into title of adverse possession.* 'A disseizor,' says Lord Coke, 'is where one enters intending to usurp the possession, and to oust another of his freehold.' *So the whole inquiry is reduced to the fact of entering and the*

intent of the disseizor to usurp possession for himself to the exclusion of others. Wherever the proof is that the one in possession entered and holds for himself to the exclusion of all others, the possession so held is adverse, and, if such possession is continued the sufficient length of time, it will ripen into title, regardless of the good faith or the bad faith of the disseizor, or whether he claimed the legal right to enter, or avowed himself a wrongdoer. The two essential elements are possession and adverse intent. The misapprehension on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as '*claim of right*,' '*claim of title*,' and '*claim of ownership*.' *These terms, when used in this connection, mean nothing more than the intention of the disseizor to appropriate and use the land as his own to the exclusion of all others. To make a disseizin it is not necessary that the disseizor should enter under color of title, or should either believe or assert that he had a right to enter.* It is only necessary that he enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others. This appropriation once made, and possession once begun, *the presence or absence of good faith of the possessor, or whether the possession originated in a naked trespass, or was taken under color or claim of title, is wholly immaterial.* The question of color of title is only material in so far as the possession claimed is derived from and depends upon the instrument constituting the color of title; that is, it applies only to the constructive possession which such an instrument gives the claimant under it." See Sedg. & W. Land Title, c. 29; *Bryan* v. *Atwater*, 5 Day, 181. (Italics ours).

THE MORAL ISSUE.

The Appellant, at page 28 of its brief, attempts to raise a moral issue in connection with the assertion of title to this land. That issue could be raised in almost every case of adverse possession that may occur. For in all such cases the occupant claims against the true owner of the property. And yet statutes of limitation exist in all civilized countries. They exist because there is *another side* to this moral question; and that is, that when one enters upon land and is permitted to occupy it for a long period, without interruption, and care for and improve it, it is inequitable not to say immoral to permit the owner of the record title to repossess himself of the land and reap the fruits of another's labor and expense.

A statute of limitations is a "Statute of repose." It is to the interest of the public, no less than that of the individuals involved, that such questions be put at rest.

This property was abandoned by its owners as worthless. When taken from Plaintiff-Appellant it was of great value.

It will not do to answer that The Vue de L'Eau Company was asleep. Grice, at whose instance, Guaranty Title & Trust Corporation was appointed receiver for that company, has always resided in that locality. If he was ever going to assert a claim to this land he should have done it years ago.

> **"An owner of premises is presumed to know the true location of his boundaries and is bound to take notice of the nature and extent of possession by a claimant."**

2 Corpus Juris, 268;
Brownson v. *Scanlan*, 59 Tex. 222.

> "He is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within them without his authority."

Willis, C. J., in *Brownson* v. *Scanlan*, *supra*.

Counsel for the Appellant appears to derive much comfort and satisfaction from the case of *Jasperson* v. *Scharenkow*, 150 Fed. 571, from which he quotes at length at page 30 of his brief. He admits that this decision rests upon a statute of the State of Washington which provides that possession, in order to ripen into title, must be under a claim and color of title "made in good faith."

But he overlooks the fact that the same Judge who decided that case, Circuit Judge Gilbert of the 9th Circuit, refused to follow it in the case of *Milwee et al.* v. *Waddleton*, 233 Fed. 989 (1916), for the reason above stated. What the former decision was based on is best stated in the Judge's own language.

> "The defendants say that plaintiff, after a judgment against him, could not claim title in good faith, and they cite *Jasperin* v. *Scharinkow*, 150 Fed. 571, and *Center* v. *Cady*, 184 Fed. 605. Those decisions were based upon a statute of the State of Washington (Ballinger's Ann. Codes & St. Para. 5503), which provided that one should

> be held to be adjudged the lawful owner of property if he were in actual, open, notorious possession of the same under a claim and color of title 'made in good faith,' and who should during said time pay all taxes legally assessed on said lands. There is no provision in the statute of Alaska that the claim should be made in good faith."

Neither is there any such statute in Virginia.

As we have already seen the Supreme Court of Appeals of Virginia has expressly held that good faith is not essential except in cases of constructive possession, *Cochran* v. *Hiden*, *supra*.

In *Virginia Midland R. Co.* v. *Barbour*, *supra*, Hicks, the disseizor, had formerly owned the property in controversy. He had taken advantage of the Bankrupt law, and in order to obtain a discharge from his debts had given up this identical property to his creditors and assigned it to his assignee in bankruptcy. The assignee had regularly sold and conveyed it to the railroad company. Hicks could have had no reason in the world for supposing he had any interest in it. He knew he had parted with the title irrevocably. And yet he remained in possession, asserted a claim to the property, and at the muzzle of a shot-gun drove the owner's agent from the premises. If, in the picturesque and somewhat facetious language of the learned Counsel for the appellant, the "Prize Lot" transaction was larcenous, then the conduct of Hicks, who used armed force to fend off the true owner, amounted to highway robbery. His title, however, at the end of the statutory period, was held complete.

Judge Buchanan in so holding said:

> "*The question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continued possession under it for the statutory period.*" (Italics ours.)

The authorities, including the Supreme Court of Appeals of Virginia, therefore hold with entire unanimity, so far as we are aware, that in order to acquire title by adverse possession it is not necessary that the occupant have anything whatever to base his claim upon; that a "claim of right or title" in the sense of the law is nothing more than an intention existing in the mind of the disseizor to hold the property as his own; that it is unnecessary to have a valid claim or to believe he has; or to *have* any claim at all. The claim consists of his own intention to hold, and this need not be openly proclaimed or expressed; but is implied in his act of holding the property as his own, and without leave or license from another.

In the case at bar the claimant not only manifested its intention to claim and hold the property in controversy by the actual and exclusive occupancy of it for upwards of seventeen years without reference or regard to the owners of the record title; but it asserted its claim in the most public way by the publication and recordation of maps claiming the entire area as its own.

The fact is not to be overlooked, that as long as the property was in the shape of land no one con-

nected with the Vue de L'Eau Company manifested any interest in it, whatever. Then Norfolk-Hampton Roads Company might have it and care for it. Only after its conversion from land into a claim against the United States, and an opportunity to sue the Government, did even Grice display any interest. Had not the Government taken the land it would, without doubt, be in the possession of Norfolk-Hampton Roads Company or some one claiming under it to this day.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment complained of, and that the same should be affirmed; and that Norfolk-Hampton Roads Company is entitled to and should have, a judgment against the appellant, and the sureties on its bond for damages and costs. It is to be borne in mind that the judgment in favor of Norfolk-Hampton Roads Company against the United States, payment of which was stopped by this appeal, bears no interest as against the United States. The damages awarded against appellant on affirmance should therefore be sufficient in any event to cover the interest on the amount of the judgment, $33,000, from the time the appeal was taken until the probable date when an appropriation can be had and payment of the judgment made.

Very respectfully submitted,

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APPENDIX.

Findings of Fact.

II.

On and prior to June 28, 1917, the plaintiff company was in possession of a certain tract or parcel of land designated as Pine Grove, situated in Tanners Creek Magisterial District of the County of Norfolk, State of Virginia, with all riparian and other rights appurtenant thereto, said parcel of land being adjacent to the tract of land known as the Jamestown Exposition Site, on Hampton Roads, Virginia, lying north of Ninety-Ninth Street and Algonquin Street, and being bounded as follows: On the north and west by the waters of Hampton Roads; on the east by the eastern line of Maryland Avenue; and on the south by One Hundred and Fourth Street and property known as the Deep Water Pier property, said parcel of land containing an area of 9.22 acres, more or less, and having a frontage of approximately 1400 feet on the shore line.

All of said parcel of land is located within the area described in the Act of Congress approved June 15, 1917, 40 Stat., 207 and said land, with the appurtenances and riparian rights belonging thereto, was taken by the President of the United States on June 28, 1917, under and pursuant to the terms of said Act of Congress, possession and control of said land being surrendered by plaintiff company to the United States on or before August 1, 1917. Thereafter, the President of the United States, acting pursuant to said Act of Congress, determined that just compensation

for said parcel of land, including appurtenances and riparian rights belonging thereto, but exclusive of buildings thereon not belonging to the owners of the land, was the sum of $37,000.00. Said sum was unsatisfactory to plaintiff company, and the payment of 75 per cent. of said sum, as provided for by said Act of Congress, was requested by plaintiff company, but the United States would make no payment whatever on said land on account of there being a question as to the validity of said company's title to a portion of said parcel of land, known as the "Prize Lot Reserve," consisting of 4.55 acres, more or less, with a frontage of about 690 feet on Hampton Roads.

III.

The said parcel of 9.22 acres of land described in Finding II had for several years immediately prior to the year 1874 belonging to the Vue de L'Eau Company, a company incorporated under the laws of the State of Virginia, being a part of a tract of about 294 acres of land owned by said company; and ownership of said parcel, with the exception of the said portion of it known as the "Prize Lot Reserve," was acquired by the plaintiff, the Norfolk-Hampton Roads Company, together with a large acreage of contiguous and adjacent lands, by purchase, about the year 1899, which ownership continued until said parcel of land was taken by the United States Government on June 28, 1917, as aforesaid.

The portion of said parcel of land so acquired by plaintiff company by purchase was 4.67 acres, more

or less, with a frontage of approximately 710 feet on Hampton Roads.

IV.

The said "Prize Lot Reserve" was located approximately midway of the Hampton Roads front of the said parcel of 9.22 acres of land described in Finding II, and for which recovery is sought in this suit. It may be more particularly described as follows, the evidence not furnishing a more definite description of it: (Here follows a detailed description of the property.)

Said "Prize Lot Reserve" consisted of lots and streets laid out by the said Vue de L'Eau Company about the year 1873, there being 16 lots fronting on Hampton Roads and 40 lots fronting on streets to the rear of the water front lots. In January, 1874, the said Vue de L'Eau Company executed a deed of assignment for the benefit of its creditors, whereby it conveyed to trustees under the assignment all of its lands and other property except the land embraced in the said "Prize Lot Reserve." So far as appears from the land records of said Norfolk County, the only sales or conveyance of lots or lands of said "Prize Lot Reserve" ever made by said company were the sales and conveyance to different persons, not parties to this suit, under date of August 1, 1873, of seven of said lots (description of lots sold follows).

V.

After its said assignment for the benefit of its creditors in 1874, the said Vue de L'Eau Company

apparently became dormant, no organization in the way of board of directors and officers being kept up; but no formal dissolution of the company or surrender of its charter appears ever to have taken place, and the legal existence of the company has recently been recognized by the Virginia courts by the appointment, by decree of April 12, 1921, of the intervenor in this suit, the Guaranty Title and Trust Corporation, as receiver of said company, with authority to take charge of the property of the company and to prosecute any claim or suits for the protection of its rights and interests.

VI.

No action with reference to the land and lots comprising the said "Prize Lot Reserve" appears to have been taken or in behalf of the said Vue de L'Eau Company from the time of the company's said assignment in 1874 for the benefit of its creditors until the appointment of a receiver for the company in April, 1921, as set forth in Finding V, and the receiver's intervention in this suit shortly thereafter, during said year 1921; and the said land and lots were allowed to remain in their former condition and to further develop forest growth thereon.

VII.

The said "Prize Lot Reserve" was inclosed on its land sides by a large acreage of land belonging to the plaintiff company, purchased by it in 1899, which in-

cluded the said 4.67 acres immediately surrounding said "Prize Lot Reserve," and involved in this suit; and upon purchasing said lands the plaintiff company, without any right, title or interest, or claim of right, title or interest, in or to the lots of land of said "Prize Lot Reserve," and with full knowledge of the fact that it had no claim of right, title or interest in or to any part of said lots or land, deliberately set about trying to acquire title to said lots and land by adverse possession; and in the course of its efforts to so acquire title thereto, the following action was taken:

The plaintiff company, upon its purchase, in 1899, of its large holdings of land inclosing said "Prize Lot Reserve" on its land side, took possession of said holdings and from thence forward to the time of its taking by the Government in June, 1917, treated the land of said Reserve as though it belonged to the plaintiff company. It recorded plats of its said property in which the land of said Reserve was included and indicated as a part of the company's holdings. The company's advertising matter issued in 1899 indicated as belonging to the company lands which included the lands of said Reserve, and said land was included in the company's subdivision known as "Subdivision No. 1, Norfolk on the Roads," a plat of which, stating said subdivision to be the "Property of Norfolk-Hampton Roads Company," was recorded in the Clerk's office on June 14, 1901. In the development of its said property, streets were opened and graded through the land of said Reserve; timber was cut therefrom and used or marketed by the company; and bulkheads were built by the company in front of the property to protect it from erosion by the waves and

tides. Said company also leased an area of its land to the Jamestown Exposition Company in 1907, including therewith said "Prize Lot Reserve" land as belonging to plaintiff company, and thereafter, upon the termination of the Exposition Company's lease, said lands were leased by plaintiff company to another tenant, by whom they were occupied for some time. And in general, the land said reserve was held out and treated by plaintiff company as being the property of said company. It does not satisfactorily appear who, if anyone, paid the taxes on said land between the years 1874 and 1917.